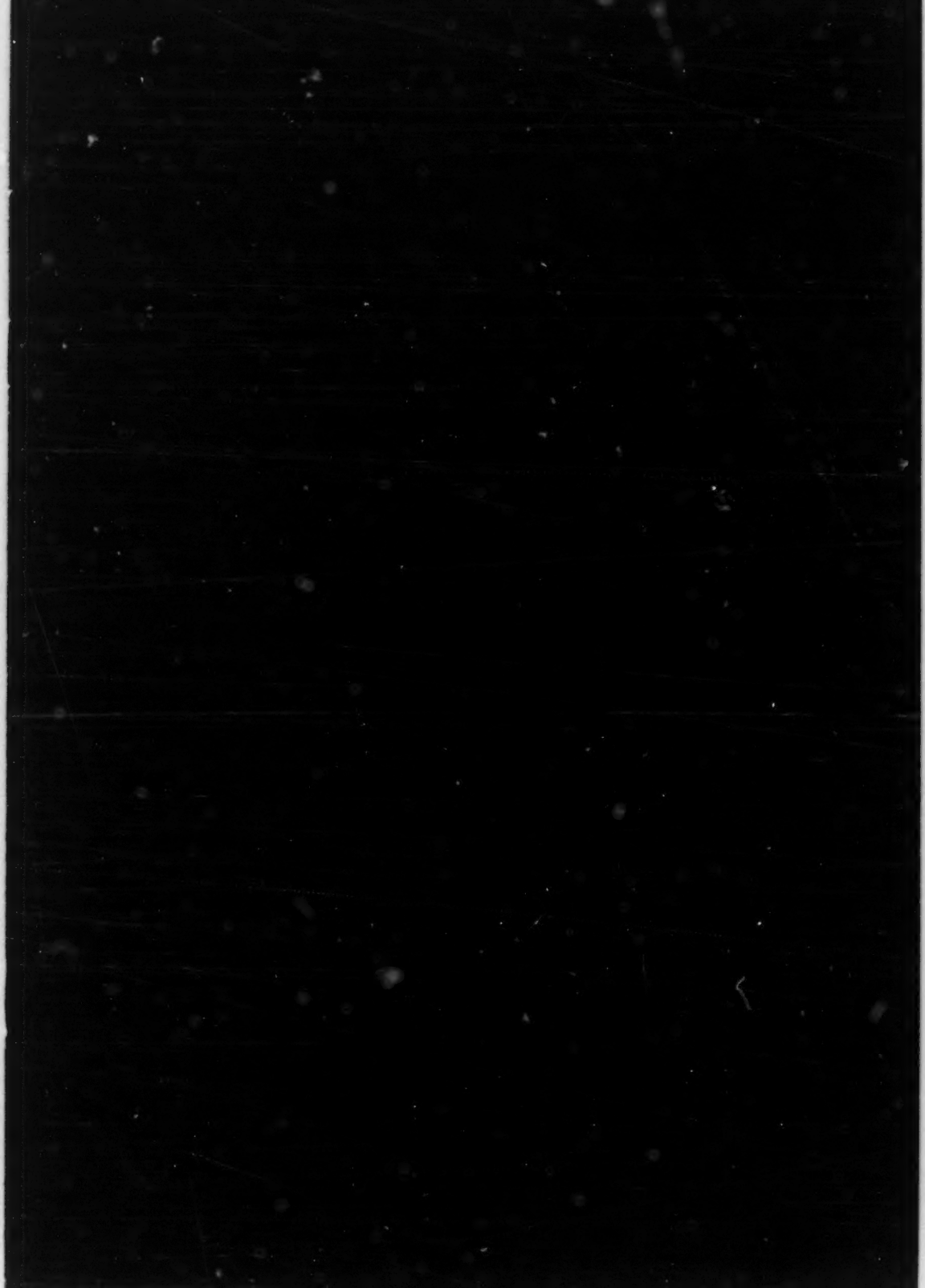

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 103

CHARLES W. BAKER, ET AL.,

Appellants

v.

JOE C. CARR, ET AL.,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

INTEREST OF AMICI CURIAE

The National Institute of Municipal Law Officers is an organization composed of over 1200 municipalities located in each of the 50 states, and the District of Columbia. Each member city acts through its chief legal officer known either as a City Attorney, Director of Law, Corporation Counsel or by a similar title.

This Brief is filed pursuant to Rule 42(4) of the Rules of this Court. The members of the National Institute of Municipal Law Officers are political subdivisions of states, and this Brief is sponsored by their authorized law officers.

The issues presented in this case vitally affect all of the municipalities in the United States. Only by means of an equal vote in state elections can residents of these

municipalities assert the needs and the interests of modern, urban communities. Only by means of equal representation in state legislatures can these cities meet the challenges now before them. Because the instant case, if reversed, would provide that equality in Tennessee, the National Institute of Municipal Law Officers has filed this *Amici* brief.

With all other avenues of relief exhausted and closed, the member cities of the National Institute of Municipal Law Officers strongly urge the Court to take jurisdiction of this case, and to decide the great national issue here presented. It is an issue of transcendent importance to all Americans.

ARGUMENT

Regardless of the fact that in the last two decades the United States has become a predominantly urban country where well over two-thirds of the population now lives in cities or suburbs,[1] political representation in the majority of state legislatures is 50 or more years behind the times.[2] Apportionments made when the greater part of the population was located in rural communities are still determining and undermining our elections.

As a consequence the municipality of 1960 is forced to function in a horse and buggy environment where there is little political recognition of the heavy demands of an urban population.[3] These demands will become

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[1] NIMLO L. Rev., Vol. 20, 82 (1957).

[2] *Ibid.* See also Council of State Governments, Book of the States, Vol. XII, 55 (1958).

[3] In 1947, residents of urban areas made up 59% of the United States population but elected only about 25% of the state legislators of the country. United States Conference of Mayors, *Government Of The People, By The People, For The People?* (1947)

even greater by 1970 when some 150 million people will be living in urban areas.[4]

The National Institute of Municipal Law Officers has for many years recognized the wide-spread complaint that by far the greatest preponderance of state representatives and senators are from rural areas which, in the main, fail to become vitally interested in the increasing difficulties now facing urban administrators.

Since World War II, the explosion in city and suburban population has created intense local problems in education, transportation, and housing. Adequate handling of these problems has not been possible to a large extent, due chiefly to the political weakness of municipalities. This situation is directly attributable to considerable under-representation of cities in the legislatures of most states.[5]

In New York City, for example, 8 million people elect only 90 members of the state assembly while 7 million "upstaters" have 118 representatives.[6] Los Angeles County with a population of 4,151,687 has but one senator while the counties of Inyo, Mono, and Alpine, California with a total of 14,014 residents have the same representation.[7] Baltimore is limited to 6 state senators regardless of the size of its population, as is

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[4] United States Municipal News, Vol. 27, No. 9, May 20, 1960. The 1960 Census will show that of the 180 million population, well over 100 million live in cities. O'Hallaren, *A Fair Share For the Cities*, Reporter Magazine, November 12, 1959, Vol. XXI, 22-24.

[5] Lewis, *Legislative Apportionment and the Federal Court*, 71 Harv. L. Rev. 1057 (1958).

[6] Strout, *The Next Election is Already Rigged*, Harper's Magazine, November, 1959, Vol. 219, 37.

[7] *Ibid.* See also McHenry, *Urban v. Rural in California*, 35 National Municipal Rev. 350, 352 (1946); *Hearings Before the Subcommittee, Committee on Government Operations*, 85 Cong., 1st Sess., at 1165 (1959).

Philadelphia, which is also allowed only 6 senators, and Providence, Rhode Island, which may only elect one-fourth of the total number of state senators.[8] Portland, Oregon, which by 1950 had grown 230% in population since a 1910 reapportionment, has not as yet received a single additional state senator.[9] 175,000 persons in Dallas and Houston, Texas have about one representative in the state legislature while in the smaller counties of the state, 30,000 people have the same representation.[10]

Nor is the lack of urban representation confined only to larger municipalities in the United States. Although Burlington, Vermont contains 33,000 persons, it has one representative in the state senate, while the little town of Victory with a population of 48 also has one state senator.[11] Because Vermont is now operating under a system of apportionment set up 167 years ago,[12] one rural vote is equal to 600 city votes. In Connecticut, which allows each town one representative in the state house and towns of over 5,000 persons, two representatives, the largest city, Hartford (with a population of 116,000) receives the same representation as Colebrook, which has 547 persons, and Union which has

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[8] Law and Contemporary Problems, *Legislative Reapportionment*, Vol. 17, No. 2, 370-371 (1952).

[9] Council of State Governments, Book of the States, Vol. XII, 55 (1958); Neuberger, *Our Rotten-Borough Legislatures*, 86 Survey 53 (1950).

[10] Letter from H. P. Kucera, City Attorney of Dallas, Texas to the National Institute of Municipal Law Officers, June 14, 1960.

[11] *Op. cit., supra*, note 6, Strout, *The Next Election is Already Rigged* at 35.

[12] Council of State Governments, Book of the States, Vol. XII, 55 (1958).

261 residents.[13] The Connecticut House of Representatives was last reapportioned in 1818.[14]

Entirely too typical of the general state voting situation is Kansas, where half of the population lives in eight urban counties, which are represented by 8 senators and 17 representatives, while the other half of the state's population receives 32 senators and 108 representatives. The malapportionment in Michigan is also indicative. There, the largest senatorial district according to the 1950 census had 396,001 people while the smallest contained only 61,008, yet each district has a single senator.[15]

Because of such under-representation, municipal de-

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[13] *Op. cit., supra*, note 8, Law and Contemporary Problems, *Legislative Reapportionment* at 371; Editorial *Down-Trodden Majority*, New Republic Magazine, Vol. 141: 3-4, November 9, 1959. See also MacNeil, *Urban Representation in State Legislatures*, 18 State Government 59 (1945) where it is noted that discrimination was found in 31% of the 42 states studied, and only 17 cities out of the 67 cities studied were represented in proportion to their population.

[14] *Ibid.*, Law and Contemporary Problems, *Legislative Reapportionment*.

[15] Because of a 1952 amendment to the Michigan Constitution, there are now glaring variances in the ratio of population of the smallest Senatorial district to the other more heavily populated districts, some of which are as follows:

District	Population in 1950	Ration of District to Smallest District
13	270,963	4.5 to 1
18	333,498	5.5 to 1
21	352,980	5.8 to 1
4	364,026	6.0 to 1
12	396,001	6.5 to 1

Source: *Scholle* v. *Hare, et al.*, 360 Mich. 1, 104 N.W.2d 63 (1960), Plaintiff's Exhibit G, Pt. 1.

velopment is severely hobbled, and the pressing urgency now for cities and suburbs to fully provide for the needs of their hundreds of thousands of residents cannot be satisfied. The full effect of existing state legislative apportionment becomes apparent when one examines the manner in which state funds are often distributed to urban communities.

The grossly unfair distribution of tax benefits in Tennessee, as described in the Appellants' Jurisdictional Statement, is by no means unusual. In Colorado, the legislature doles out to the City of Denver a mere $2.3 million per year in school aid which must provide facilities and services for 90,000 children. By contrast, Jefferson County, Colorado, which is a semi-rural area gets $2.4 million for 18,000 pupils.[16]

Similarly in Pennsylvania, the legislature pays $8 a day for the care of indigent persons to all non-sectarian hospitals in the state with the exception of the city-owned Philadelphia General Hospital which has to provide such services at a yearly cost of $2.5 million.[17] Philadelphia also spends $26 million a year on its city highways, yet it receives only a $2 million apportionment from state taxes of which it contributed over $20 million.[18] San Francisco receives considerably less for its schools than do its neighboring counties, and there-

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[16] *Op. cit., supra*, note 6, Strout, "The Next Election is Already Rigged" at 37.

[17] *Ibid.* See also Municipalities and the Law in Action (1946 ed.) 96.

[18] Statement of Mayor Richardson Dilworth, *Hearings before the Subcommittee of the House, Committee on Government Operations*, 85th Cong., 1st Sess., at 352 (1958) in which Mayor Dilworth also noted at 337 that until a redistricting of "rotten boroughs" occurred, the cities will continue to face the inability of the states to cope with the manifold problems of metropolitan areas."

fore city taxpayers provide for the education of children in other school districts throughout the state.[19]

Thus, in spite of the fact that city and suburban dwellers outnumber the citizens of rural communities, the rural voters, nevertheless, are overwhelmingly in control of state legislatures so that conservative thinking dominates the state legislative atmosphere and the state treasuries.[20] It is impossible for municipal administrators, therefore, to effectively cope with such staggering problems as slum clearance, the need for new schools, or urban development in this unfair and frustrating atmosphere.

Nearly every state constitution on its face provides for the periodic apportionment of state legislative seats on the basis of population.[21] Disregard for such constitutional commands is shocking to any observer, yet the majority of state legislators blandly ignore any pleas for reapportionment—just as the Tennessee legislature has in the instant case—because of the obvious loss of rural power which would accompany an equitable distribution of representation. This is so even though millions of urban residents are daily deprived of the representation which they deserve and which their circumstances clearly require.

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[19] *Hearings Before the Subcommittee, Committee on Government Operations*, 85th Cong., 1st Sess., at 1161 (1959).

[20] As graphically stated by Mayor Ben West of Nashville, Tennessee, "the State is being ruled by the hog lot and the cow pasture." NIMLO L. Rev., Vol. 20, 83 (1957). The City of Portland, Maine has received little or no consideration from the state legislature when it has attempted to sponsor legislation. Letter from Barnett I. Shur, Corporation Counsel of Portland, Maine to the National Institute of Municipal Law Officers, June 13, 1960.

[21] Council of State Governments, Book of the States, Vol. XII, 52-56 (1958).

The courts of at least twenty states have exercised the power or have stated that they possessed the power, to review legislative reapportionment acts upon constitutional grounds. Recognition of the judicial burden to invalidate legislative action exceeding the boundaries of the authority delegated by a state constitution has been accepted in the following cases: *Shaw* v. *Adkins*, 202 Ark. 856, 153 S. W. 2d 415 (1941); *Armstrong* v. *Mitten*, 95 Colo. 425, 37 P. 2d 757 (1934); *Moran* v. *Bowley*, 347 Ill. 148, 179 N. E. 526 (1932); *Parker* v. *Powell*, 133 Ind. 178, 33 N. E. 119 (1892); *Parker* v. *State*, 133 Ind. 178, 32 N. E. 836 (1896); *Denny* v. *State*, 144 Ind. 503, 42 N. E. 929 (1896); *Brooks* v. *State*, 162 Ind. 568, 70 N. E. 980 (1904); *Stiglitz* v. *Schardien*, 239 Ky. 799, 40 S. W. 2d 315 (1931); *Atty. General* v. *Suffolk County Commissioners*, 224 Mass. 598, 113 N. E. 581 (1916); *Donovan* v. *Suffolk County Commissioners*, 225 Mass. 55, 113 N. E. 740 (1916); *Merrill* v. *Mitchell*, 257 Mass. 184, 153 N. E. 562 (1926); *Houghton County* v. *Blacker*, 92 Mich. 638, 52 N. W. 951 (1892); *Giddings* v. *Blacher*, 93 Mich. 1, 52 N. W. 749 (1892); *Williams* v. *Secretary of State*, 145 Mich. 447, 108 N. W. 749 (1906); *Barrett* v. *Hitchcock*, 241 Mo. 433, 146 S. W. 40 (1912); *Rogers* v. *Morgan*, 127 Neb. 456, 256 N. W. 1 (1934); *People* v. *Kings County*, 138 N. Y. 95, 33 N. E. 827 (1893); *Sherrill* v. *O'Brien*, 188 N. Y. 185, 81 N. E. 124 (1907); *State ex rel. Atty. General* v. *Cunningham*, 81 Wis. 440, 51 N. W. 724 (1892); *State ex rel. Lamb* v. *Cunningham*, 83 Wis. 90; 53 N. W. 35 (1892).

Reapportionment statutes have been upheld in certain cases as not in violation of a particular constitutional mandate, and relief has been declined on other grounds, but in seventeen of these cases, jurisdiction

was noted. See *People ex rel Woodyatt* v. *Thompson*, 155 Ill. 451, 40 N. E. 307 (1895); *Heffernan* v. *Carlock*, 198 Ill. 150, 65 N. E. 109 (1902); *Fesler* v. *Brayton*, 145 Ind. 71, 44 N. E. 37 (1896); *Donovan* v. *Holtzman*, 8 Ill. 2d 87, 132 N. E. 2d 501 (1956); *Prouty* v. *Stover*, 11 Kan. 183 (1873); *Opinion of the Justices*, 18 Me. 458 (1842); *Brophy* v. *Suffolk County Apportionment Commissioners*, 225 Mass. 124, 113 N. E. 1040 (1916); *Meighen* v. *Weatherill*, 125 Minn. 336, 147 N. W. 105 (1914); *Smith* v. *Holm*, 220 Minn. 486, 19 N. W. 2d 914 (1945); *State ex rel. Winnie* v. *Stoddard*, 25 Nev. 452, 62 Pac. 237 (1900); *People ex rel. Carter* v. *Rice*, 135 N. Y. 473, 31 N. E. 921 (1892); *Baird* v. *Kings County*, 142 N. Y. 523, 37 N. E. 619 (1894); *Smith* v. *St. Lawrence County*, 148 N. Y. 187, 42 N. E. 592 (1896); *Matter of Reynolds*, 202 N. Y. 430, 96 N. E. 87 (1911); *Jones* v. *Freeman*, 193 Okla. 554, 146 P. 2d 564, *appeal dismissed* and *cert. denied*, 322 U. S. 717 (1943); *Bowman* v. *Dammann*, 209 Wis. 21, 243 N. W. 481 (1932); *Sullivan* v. *Schnitger*, 16 Wyo. 479, 95 Pac. 698 (1908).

Wherever limitations imposed by a constitution upon the various departments of a state government are disregarded, the courts must be open to do justice. This proposition is an elementary one and is supported by the vast weight of state authority in this country.

> "It is well settled that courts have jurisdiction and authority to pass upon the validity of legislative acts apportioning the state into senatorial or other election districts and to declare them invalid for failure to observe non-discretionary limitations imposed by the Constitution. State ex rel. Barrette v. Hitchcock, 241 Mo. 433, Loc. Cit. 473, 146 S. W. 40, Loc. Cit. 53 and cases cited.

Annotation 2 ALR 1337; 18 Am. Jur. 191-201, Sec. 16-31; 16 C.J.S. Const. Law, 4147, page 438. See also Jones v. Freeman, 193 Okl. 554, 146 P. 2, 564, Locus cited 570, stating that the courts of 38 states have exercised this power. However, these authorities show, the courts may not interfere with the wide discretion which the legislature has in making apportionments for establishing such districts when the legislative discretion has been exercised. *It is only when constitutional limitations placed upon the discretion of the legislature have been wholly ignored and completely disregarded in creating districts that the Courts will declare them to be void. In such a case, discretion has not been exercised and the action is an arbitrary exercise of power without a reasonable or constitutional basis.*" [emphasis supplied by court] *Preisler* v. *Doherty*, 284 S. W. 2d 427, 431 (1955).

The nature of the wrong suffered by the aggrieved Tennessee voters in this appeal was singled out recently by the Supreme Court of New Jersey,[22] which on June 6, 1960, decided that:

> "Inaction which causes an apportionment act to have unequal and arbitrary effects throughout the State is just as much a denial of equality as if a positive statute had been passed to accomplish the result. In our view, such deprivation not only offends against the State Constitution but may very well deny equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution." 161 A. 2d at 710.

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[22] *Asbury Park Press, Inc.* v. *Woolley*, 33 N.J. 1, 161 A. 2d 705 (1960).

The New Jersey Court acknowledged that it had jurisdiction to hear the matter of the unconstitutionality of the 1941 General Assembly Apportionment Act. However, it withheld any determination in order to afford the State Legislature an opportunity to consider the adoption of a reapportionment act when the preliminary 1960 Federal Census data became available, within a reasonable time prior to the 1961 primary election on April 18, 1961.

On January 24, 1961, the State Supreme Court was asked by the Asbury Park Press, Inc. petitioners to reapportion without delay the sixty seats in the General Assembly because the New Jersey legislature continued its past inaction. The Court reserved judgement following oral argument, although Chief Justice Joseph Weintraub warned that the judiciary would compel reapportionment if the legislature did not itself act.[23]

Following the January 24, 1961 argument before the New Jersey high tribunal, the Court informed the Legislature that unless reapportionment action was forthcoming by 5 P. M., on February 2, 1961, a prepared opinion in the *Asbury Park Press, Inc.* v. *Woolley* case *supra* would immediately be filed. As reported by the *New York Times Newspaper*, "the General Assembly met in . . . [a] special session . . . and suspended its rules to adopt the Senate-approved reapportionment bill. Forty-three minutes later, at 3.13 P.M., Gov. Robert B. Meyner signed the measure."[24]

It is manifest from the foregoing cases that the separation of powers concept in government is not invaded by acceptance of, and action pursuant to, this litigation. It is particularly important that the appeal in this case

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[23] New York Times, Jan. 24, 1961, p. 31, col. 6.

[24] Id. Feb. 2, 1961, p. 1, col. 2.

be decided on its merits. Here, there is a record replete with the most vicious denials of rights enunciated by both the Tennessee and Federal Constitutions which must not be compromised by any arguments of legislative prerogative or judicial abstention. Here there is no other possible avenue of remedial action absent this Court's effective judgment.

The failure of the Court to effectively restore to the Appellant Tennessee voters their sacred rights in a democratic society would thus completely shock and thoroughly dishearten citizen voters in every American city. If the Court fails to grant relief in a case as outrageous as the case at bar, little doubt exists that the continued, oppressive voting discrimination herein complained of will remain to flourish and to grow worse.

CONCLUSION

It is therefore respectfully urged that the Court accept jurisdiction of this case, and decide it on its merits. We have no doubt whatsoever that such consideration would end the gross discrimination herein complained of.

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